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In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-492

KUNSTSAMMLUNGEN ZU WEIMAR,

Petitioner,

against

FEDERAL REPUBLIC OF GERMANY, EDWARD I. ELICOFON and ELISABETH MATHILDE ISIDORE ERBGROSSHERZOGIN VON SACHSEN-WEIMAR-EISENACH (GRAND DUCHESS OF SAXONY-WEIMAR),

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Questions Presented

The central issue presented is the question whether, in the face of explicit findings by the district court, affirmed by the court of appeals, that the petitioner is an arm or agency of the German Democratic Republic and that its juridical status was conferred upon it at the threshold of this litigation for the purpose of avoiding the consequences of the doctrine of non-recognition, petitioner must be allowed to sue in the federal courts, notwithstanding the continuing refusal of the Executive Branch to recognize either the state or government of the German Democratic Republic. This central issue presents three subordinate questions.

1. Whether the long-standing and consistently applied rule which excludes non-recognized governments as litigants should be overturned.

2. Whether the 1923 Treaty of Friendship, Commerce and Consular Rights between the United States and Germany confers a right to sue on an agency of the GDR, despite non-recognition.

3. Whether an agency of the GDR is entitled to sue, despite non-recognition, on the theory that the GDR is itself merely an agency of the (recognized) government of the Soviet Union.

Statement of the Case

These actions represent attempts, twenty-five years after the event, to recover two oil paintings by Albrecht Duerer alleged to have been stolen in July 1945 from the war-time repository of the collections of the Staatliche Kunstsammlungen zu Weimar ("State Art Collections in Weimar"), in Weimar, Germany. The defendant has answered asserting his purchase for value and in good faith, and in ignorance of any adverse claim, and raised various affirmative defenses. The merits of these issues are not involved in the aspect of the litigation presented by the petition, which on the contrary reflects a controversy among the Federal Republic of Germany, the petitioner, and the United States as to the right of the GDR to participate through the petitioner as a litigant.

The complaint of the Federal Republic asserted that it was "the only government which may represent the German people" and advanced a claim to the paintings "in order ultimately to restore them to the person or party who is truly and rightfully entitled to their possession" (A 3).[1] The

1. References designated "A" are to pages of the Joint Appendix in the court of appeals.

hereditary Grand Duchess of Saxe-Weimar-Eisenach intervened in the action commenced by the Federal Republic, alleging a claim to the paintings as personal property of the former grand ducal house. The petitioner then commenced an independent action to recover the paintings and at the same time moved to intervene in the action commenced by the Federal Republic, asserting that the Federal Republic had no interest in the paintings (A 19). The affidavit of April 11, 1969, accompanying the motion to intervene stated that petitioner "is in existence [and] is functioning as an active and duly constituted juristic entity" (A 17), although it was subsequently made clear that that status derived from an order of the Minister of Culture of the GDR dated three days thereafter, on April 14, 1969, and made by its terms retroactive to January 1, 1969 (A 36).

In July 1969 the United States filed a "Suggestion of Interest" (A 22-23) stating that the United States does not recognize the East German regime, that it recognized the Federal Republic "as the only German government entitled to speak for Germany as the representative of the German people in international affairs," and that it recognized the Federal Republic as entitled to represent the interests of the Weimar Museum in the litigation. The State Department reiterated the position that the United States does not recognize the East German regime in a letter from the Acting Legal Adviser submitted to the district court on August 2, 1972 (A 365-68).

In a decision dated June 25, 1970 (Pet., pp. 6a-11a) Chief Judge Mishler held that the GDR itself, because of nonrecognition, could not sue but invited a further factual showing as to the relationship of the petitioner to the GDR. Thereupon, after depositions in Vienna of four East Ger-

man witnesses presented by the petitioner,[1] and the testimony of a West German expert on East German law given in open court, the district court issued its supplemental decision. It found that petitioner was "performing a governmental function as an arm or agency of the GDR" prior to the order of April 14, 1969, that that order "in no way altered the relationship between [petitioner] and the GDR," and that, in any event, the order was "designed by the GDR to avoid the obstacle erected against a non-recognized power for the purpose of this litigation" (Pet., p. 14a). In consequence, petitioner's motion to intervene was denied, and judgment was entered dismissing petitioner's independent action. The court of appeals affirmed (Pet., p. 5a).

Reasons Why The Writ Should Be Denied

1. The principle that closes the courts of the Nation to an unrecognized foreign government is well-established, supported in prior decisions, including decisions of this Court, and justified by the constitutional division of authority among the branches of the Federal Government which assigns to the Executive Branch the conduct of foreign affairs. The petitioner cites no contrary decisions, for there are none, and in discussion of the principle of the matter is able to do no more than reiterate the views of a school of commentary that for many years has been critical of decisions in this Court and elsewhere which recognize the heavily political character of issues of foreign affairs, such as this one, and hence their inappropriateness for judicial

1. Visas to permit the witnesses to come to New York to testify were refused.

resolution.[1] The established doctrine is sound and was correctly applied below, and there is no need for review in this Court. Moreover, as we show in point 2, below (pp. 7-10), the special circumstances applicable to Germany would make this a particularly inappropriate case for any reconsideration of the doctrine.

Contrary to the suggestion in the petition (Pet., p. 8), the decision for a unanimous Court in *Guaranty Trust Co.* v. *United States*, 304 U.S. 126 (1938), cannot be disposed of simply as dictum. The issue there was the right of the United States under the Litvinoff Assignment to press a claim arising out of an Imperial Russian deposit account found by the district court to have been repudiated sufficiently prior to suit to bar the claim if the six-year New York statute of limitations applied to it. In this context, Justice Stone's statement that "[I]n conformity to generally accepted principles, the Soviet Government could not maintain a suit in our courts before its recognition by the political department of the Government" (304 U.S. at 137), was no idle observation, for the case would have presented quite a different aspect had it been true that the assignor had simply forborne to sue although able to do so. Other decisions applying or recognizing the exclusionary rule include *Bank of China* v. *Wells Fargo Bank*, 104 F. Supp. 59

1. With the criticism of the *Cibrario* decision (*Russian Socialist Federated Soviet Republic* v. *Cibrario*, 235 N.Y. 255 (1923)), to which petitioner points (Pet., p. 13), should be compared criticism of this Court's decision in *United States* v. *Pink*, 315 U.S. 203 (1942), see Borchard, *Comment, Extraterritorial Confiscations*, 36 Am. J. Int. Law 275 (1942), and *Comment, Shall the Executive Agreement Replace the Treaty*, 38 Am. J. Int. Law 637, 643 (1944), and of its decision in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), see Stevenson, *The State Department and Sabbatino—'Ev'n Victors Are by Victories Undone,'* 58 Am. J. Int. Law 707-08 (1964), in which it is suggested that this Court had "taken up with a vengeance the implications in the State Department's brief that United States courts are not appropriate fora for the resolution of controversial international law questions."

(N. D. Calif. 1952), *modified*, 209 F.2d 467 (9th Cir. 1953); *The Penza*, 277 Fed. 91 (E.D.N.Y. 1921); *The Rogdai*, 278 Fed. 294 (N.D. Calif. 1920); *Russian Socialist Federated Soviet Republic* v. *Cibrario*, 235 N.Y. 255 (1923); *State of Yucatan* v. *Argumedo*, 92 Misc. 547, 157 N.Y.S. 219 (Sup. Ct. N.Y. Co. 1915); *City of Berne* v. *Bank of England*, 9 Ves. 347, 32 E.R. 636 (Ch. 1804); *cf. Land Oberoesterreich* v. *Gude*, 109 F.2d 635 (2d Cir. 1940); see also *Latvian State Cargo & Passenger S.S. Line* v. *McGrath*, 188 F.2d 1000 (D.C. Cir.), *cert. den.*, 342 U.S. 816 (1951); *The Maret*, 145 F.2d 431 (3rd Cir. 1944); *The Florida*, 133 F.2d 719 (5th Cir.), *cert. den. sub nom. Tiedemman et al.* v. *Estoduras S.S. Co., Inc.*, 319 U.S. 774 (1943).

It has been settled doctrine for more than a century that it is not open to courts "to inquire into, and ascertain by other evidence the title of an [unrecognized] government . . . and if such evidence satisfies the court, to decide against the doctrines and claims set up and supported by the American government on this subject"; on the contrary, "as the executive . . . has denied [its] jurisdiction . . . the fact must be taken and acted on by this court as thus asserted and maintained." *Williams* v. *Suffolk Ins. Co.*, 13 Pet. (38 U.S.) 415, 417, 420 (1939). Accord, *Jones* v. *United States*, 137 U.S. 202, 212 (1890); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 410 (1964); *Restatement (Second), Foreign Relations Law of the United States*, Reporter's Note to § 106.

The *Sabbatino* decision emphasized the "unique legal aspect" of non-recognition, signifying "this country's unwillingness to acknowledge that the government in question speaks as the sovereign authority for the territory it purports to control," and that, in consequence, to permit such a government (as distinct from one with which merely

diplomatic relations were broken) to sue risked "the possible incongruity of judicial 'recognition,' by permitting suit, of a government not recognized by the Executive." (376 U.S. at 410). These views were properly applied by the courts below. The suggestion in the petition, that an exception should be recognized for claims to property (Pet., pp. 17-18), was rejected below for good reason. Aside from the fact that most such suits would involve claims to property, so that any "exception" would replace the rule, the suggestion ignores the central point, explicit in Mr. Justice Harlan's reasoning in *Sabbatino,* that the possible incongruity does not depend on the *nature* of the claim but rather arises out of the assertion, necessarily advanced in any such case, that as a government the unrecognized foreign party possesses and asserts whatever the claim may be.

There is no issue in this Court that, as the district court found, and the court of appeals affirmed, the petitioner prior to being hastily clothed with juridical status was "performing a governmental function as an arm or agency of the GDR," that the order of April 1969 conferring that status "in no way altered the relationship between [petitioner] and the GDR" and that the order, in any event, was "designed by the GDR to avoid the obstacle erected against a non-recognized power for the purpose of this litigation" (Pet., p. 14a). This Court's decisions establish that "in the absence of a very obvious and exceptional showing of error," which has not even been attempted here, "this Court . . . cannot undertake to review concurrent findings of fact by two courts below." *Graver Mfg. Co.* v. *Linde Co.,* 336 U.S. 271, 275 (1949); *Berenyi* v. *Immigration Director,* 385 U.S. 630 (1967).

2. Even were there a basis for accepting some modification in the traditional broad exclusion of unrecognized governments as suitors in the courts, the special circumstances

obtaining as to Germany make any initiatives by the Judicial Branch particularly inappropriate. In the usual case, the status of a state or government arises out of circumstances in which the United States has no direct role. In regard to Germany, however, the circumstances are wholly different and without precedent—and likely without future parallel. The formal status of Germany is a matter of international agreements to which the United States is a party and under which it claims rights, and any recognition of the state or government of East Germany thus would constitute the quite extraordinary situation of a waiver by the United States of rights purportedly assured by contract. Even in the normal case, the political character of recognition has sufficed to induce the courts to exclude the unrecognized government. The case for doing so is that much stronger in regard to Germany, both because of this history and also because of the obviously critical role which "the German situation" plays in United States policy toward Europe.

It will suffice to recall to the Court that the original agreements in regard to Germany expressly provided that four-power "assumption of powers and authority does not affect the annexation of Germany" and left for subsequent agreement any changes in the boundaries of Germany as they existed in 1937.[2] The original conception was that supreme

2. Declaration of June 5, 1945, and Allied Statement on Zones of Occupation in Germany of the same date. *Documents on Germany, 1944-1970,* Sen. Comm. on For. Rel., 92nd Cong., 1st Sess (1971) (hereafter cited as "Documents on Germany") 13, 17. The Statement on Zones of Occupation defined "Germany" by reference to its boundaries on December 31, 1937. As thus defined the Soviet Zone for purposes of occupation included East Prussia and those parts of Germany proper east of the Oder-Niesse line which the Soviet Union, Poland and Czechoslavakia have subsequently purported to incorporate into their national territory, notwithstanding the explicit language in the June 5 Declaration. See, for example, the Agreement of June 6, 1950, on Demarcation of the Polish-[East] German Frontier, *Documents on Germany* 179.

authority in "matters affecting Germany as a whole" would be taken by the Four Powers jointly and unanimously. *Documents on Germany* 18. The Potsdam Agreements (July-August 1945) laid down rules for administration of Germany as a unitary whole so that "so far as practicable, there shall be uniformity of treatment of the German population throughout Germany," with the further prescription that "during the period of occupation Germany shall be treated as a single economic unit." *Documents on Germany* 33, 35. It is at once apparent that the arrangements contemplated in these agreements precluded the development of a sovereign state encompassing merely the portion of the Soviet Zone left after the incorporation, itself unauthorized, of segments of pre-war eastern Germany into the Soviet Union, Poland and Czechoslavakia. See generally, Mann, *Germany's Present Legal Status Revisited,* 16 Int. & Comp. L. Q. 760 (1967).

Subsequently, of course, unitary administration fell victim to American-Soviet differences. The Soviet Commander walked out of the four-power Control Council in March 1948, which ceased to function, the Berlin blockade and airlift followed, and in September 1949 the Federal Republic of Germany was established. The Soviet Union created the GDR in October of the same year. See Mann, *op. cit. supra,* 762-65. The treaty arrangements made by the Western Powers with the Federal Republic carefully reserved to the Powers "the rights and responsibilities, heretofore exercised or held by them, relating to Berlin and Germany as a whole, including the reunification of Germany and a peace settlement."[3] The Soviet Union, aim-

3. Convention on Relations Between the Three Powers and the Federal Republic of Germany, Arts. 1(2), 2, May 26, 1952, as amended by Schedule I to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, October 23, 1954, 6 U.S.T.&O.I.A. 4121, T.I.A.S. No. 3425. *Documents on Germany* 249.

ing by contrast at a divided Germany *in perpetuo*, recognized the Federal Republic in 1955 (*Documents on Germany* 272-73), at the same time concluding a treaty with the GDR in which the parties "reaffirm that the relations between them are based on complete equality of rights, mutual respect of sovereignty and the non-interference in each other's domestic affairs." *Documents on Germany* 274. Thus, for eighteen years it has been the Soviet view that "on the territory of Germany there exist two independent sovereign states . . ." Soviet Note of October 18, 1955, *Documents on Germany* 278. The contrary position of the United States has been that it recognizes neither "the East German regime nor the existence of a state in the Soviet Zone." Statement of September 28, 1955, *Documents on Germany* 276.

Where, as here, the "facts giving rise to the pretended new title [the statehood of the GDR] are in violation of international law . . . recognition fulfills a function altogether distinct from other aspects of recognition," constituting by exercise of a "political function" the "waiver of a right." Lauterpacht, *Recognition in International Law* 412. Against this background it would be more than merely "incongruous" for the Court to acknowledge the pretensions of the GDR in this litigation in direct conflict with the reiterated, and still unchanged, policy of the United States.[4] The petitioner's applications for an extension of time to file its petition have given emphasis to the supposed imminence of a change in that policy. It is surely suf-

4. Statements of the policy appear in 23 Dept. of State Bull. 530 (1950); 33 Dept. of State Bull. 559 (1955); 50 Dept. of State Bull. 993 (1964); in the original Suggestion of Interest in this case (A 22-23), reiterated in a Memorandum on Behalf of the United States, dated July 31, 1972 (A 365-68).

ficient that it has not yet occurred.[5] Moreover, it is surely not for the Court to anticipate. If concessions were to be sought in any negotiations on the subject, premature "judicial recognition" of which the opinion in *Sabbatino* was apprehensive could, of course, easily and seriously compromise political objectives.

3. The petitioner's suggestion that it should be viewed as a sub-instrumentality of the Soviet Union, concededly based on a fiction (Pet., p. 25), is more accurately a *reductio ad absurdum*. There is of course no factual support for it, for the view of the Soviet Union and the GDR, as expressed in the treaty of 1955 between them, discussed above, p. 10, is directly at variance with the petitioner's suggestion that they should be treated as principal and agent. Nor is there policy-reasoned support for any such fiction. The United States does not regard the Soviet Union as the responsible government of East Germany in any sense material here. As already noted (pp. 8-9, *supra*), the Soviet Union is not in any ordinary way sovereign in East Germany, and there is no proper basis for concluding that the Soviet Union (through its "agent," the petitioner) is the appropriate spokesman *abroad, viz.*, in this litigation, for that portion of Germany territorially

5. The admission of East Germany to the United Nations does not itself constitute recognition by the United States. The Byelorussian S.S.R. and the Ukranian S.S.R. are both members of the United Nations, but neither is recognized as a state by the United States. *Restatement (Second), Foreign Relations Law of the United States*, § 105, Reporter's Note. This would appear to be a particular instance of the more general view, which has been explicitly adopted as United States policy, that "recognition of a regime or acknowledgment of an entity [as a state] cannot be inferred from signature, ratification or accession to a multilateral agreement." 56 Dept. of State Bull. 78 (1967). For obvious reasons, negotiations looking toward possible recognition would not themselves constitute recognition. *Restatement, supra* § 104(1).

described as East Germany. Logically, one reaches this contention of petitioner's only if its primary contention has been rejected, and thus one confronts the petitioner-as-agent-of-the-Soviet-Union only after it has been concluded that petitioner, as petitioner, ought not to be allowed to sue because of non-recognition of the GDR. In that context, to accept the fiction explicit in the Soviet agent theory is to strive for a conclusion dependent upon recognition of a legitimate Soviet role in East Germany as much at variance with United States policy as a judicial recognition of an independent East Germany.

The only authority which petitioner advances is the decision of the House of Lords in the English *Zeiss* case, *Carl-Zeiss-Stiftung* v. *Rayner and Keeler, Ltd.*, [1966] 2 All E. R. 536 (H.L.). The certificate of the Foreign Office upon which the court acted, referring to the *de jure* authority of the Soviet Union in the East Germany, differed materially from the views stated to the court here by the State Department, and the result reached by the House of Lords has been severely criticized. See Mann, *op. cit. supra* at 773-76; *Comment, A Divided Country in Foreign Courts—Recent Litigation Involving Germany's Legal Status and the Zeiss Stiftung*, 65 Mich. L. Rev. 924, 930-31, 937-39 (1967). In any event a situation more completely *sui juris* than these circumstances would be hard to envisage, and as such this issue presents no claim to review on the merits in this Court.

4. The 1923 Treaty issue was correctly decided below, and raises no question requiring review in this Court. In the view which the petitioner necessarily takes of the Treaty, Article XII confers the right of suit, notwithstanding non-recognition, on the government of East Germany itself (or its instrumentality). This is wrong for two

reasons. First, the Treaty text does not confer any right of access to courts on *public* corporations such as petitioner. This is clear from the context in the English version, but clear also as a matter of the Treaty language itself in the parallel German version which speaks of access to the courts of either contracting party by "Juristische Personen des Privatrechts", meaning "legal persons of private law." On no theory does petitioner qualify as such an institution.[6] Secondly, if the text of the Treaty conferred such a right on the GDR (or petitioner), it would be plain that it conflicted directly with superseding policy of the Executive Branch taken in the conduct of foreign affairs, within the doctrine recognized by this Court in *Clark* v. *Allen*, 331 U.S. 503 (1947). To give Article XII the reading urged by petitioner would run directly counter to the statement furnished by the State Department to the courts in this litigation that the Treaty "does not require that the privilege of bringing suit be accorded to the East German regime or an agency of instrumentality of that regime. . . ." (A 368).

Many provisions of the Treaty, which on petitioner's reading should have application to the East German regime, plainly have none, and this circumstance is a forceful commentary on petitioner's view of the applicability of Article XII. Articles XVII-XXVII, for example, deal with the exchange of consular officials, the establishment of their rights, privileges and immunities on a "most favored nation basis" (Article XVII), and other questions of consular functions. These provisions of course are dead letters; the

6. There is no question that petitioner is a "legal person of public" not "private" law. It was created by the Minister of Culture to perform public functions and its employees are public officers (A 275-78). Were it a juridical person of private law, it would be incapable of acting, as in fact it does (see pp. 21-22 of the separate volume of Exhibits in the Court of Appeals), as a "bearer of rights" of "people's property." (A 311).

United States does not recognize any consular function of the GDR. Even Article I of the Treaty, purporting to confer on nationals of the contracting parties reciprocal rights of entry, travel and residence on a most-favored-nation basis, must be contrasted with the circumstance that East German witnesses could not, in fact, obtain visas to attend hearings in this litigation. What these circumstances represent is an illustration of the possibility noted in *Clark* v. *Allen, supra*, that "the Chief Executive or the Congress may have formulated a national policy quite inconsistent with the enforcement of a treaty in whole or in part." (331 U.S. at 508-09). Thus, there is no reason not to accept the State Department view that the Treaty does not require allowing petitioner to sue.[7]

Conclusion

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted,

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7. Cf. *Terlinden* v. *Ames*, 184 U.S. 270, 288 (1902): "[T]he question whether power remains in a foreign State to carry out its treaty obligations is in its nature political and not judicial, and . . . courts ought not to interfere with the conclusions of the political department in that regard."